(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARY A. HARRIS,

Petitioner,

v.

JOYCE A. LADNER, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CLIFFORD ANDREW BROOKS
BROOKS AND ENGLAND
7722/304 Hanover Parkway
Greenbelt, Maryland 20770
(301) 441-2224
Counsel for Petitioners.

September 25, 2000

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QUESTIONS PRESENTED

1. Whether, under the Civil Rights Act of 1866 (42 U.S.C. Section 1981), a plaintiff's *prima facie* case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its employment decision, is always adequate **to fend off summary judgment** and preserve plaintiff's case for the jury's determination of whether the employment decision was motivated by unlawful discrimination, *vel non.*

2. Whether, in an employment discrimination case, Due Process and Federal Rule of Civil Procedure 56 permit a district court to award summary judgment to the employer without allowing the employee a "full and fair" opportunity to cross-examine the employer regarding the employer's proffered explanation for its employment decision.

3. Whether Due Process and 28 U.S.C. 455 will permit a judgment entered by a district court judge to stand where said district court judge failed to disclose on the record his seven years as a full time employee of, and other relationships with, the party in whose favor said judgment is entered.

4. Whether a federal appeals court may summarily affirm a district court's grant of summary judgment, without a *de novo* review of all relevant evidence that was before the district court, and without oral argument.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Courts below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States:

(1) Mary A. Harris, plaintiff/appellant;
(2) Joyce A. Ladner, defendant/appellee;
(3) Franklyn G. Jenifer, defendant/appellee;
(4) Moraima Donahue, defendant/appellee;
(5) John Doe (unknown person[s]), defendant/appellee;
(6) Howard University, Inc., defendant/appellee;
(7) Clarence Lee, defendant/appellee;
(8) James Davis, defendant/appellee; and
(9) Karen Wallace, defendant/appellee.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is believed to be unreported, but is included in the Appendix to this petition ("Pet. App.") at 1a-3a. The Orders of the United States Court of Appeals for the District of Columbia Circuit denying petitioner's petition for rehearing and suggestion of rehearing *en banc* is believed to be unreported, but is included in Pet. App. at 29a-31a. The U.S. District Court's Order and Memorandum Opinion, dated and filed on November 29, 1999, and two supporting and/or subordinate Orders are all believed to be unreported, but are included in Pet. App. at 4a-24a and 25a-28a, respectively.

JURISDICTION

The United States Court of Appeals for the District of Columbia entered judgment on May 3, 2000, and denied petitioner's timely petition for rehearing and suggestion of rehearing *en banc* on June 27, 2000. The Supreme Court of the United States has jurisdiction by Writ of Certiorari under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States, the Civil Rights Act of 1866 (42 U.S.C. Section 1981), 28 U.S.C. Section 455, and Fed. R. Civ. P. 56 are involved in this case. Said provisions appear in Pet. App. at 32a-40a.

STATEMENT OF THE CASE[1]

This matter originally came before the District of Columbia Superior Court on petitioner's ("Dr. Harris" or "plaintiff") complaint, with jury demand, that in connection with Dr. Harris' tenure application Respondent Howard University and certain of its officials ("Howard" or "defendant[s]" or "respondent[s]"): (1) violated Dr. Harris' civil rights under 42 U.S.C. Sect. 1981 by discriminating against her because of her race (Black) and national origin (Guyanese); (2) violated Dr. Harris' Constitutional rights by denying her both substantive and procedural due process of law and by denying her equal protection under the laws secured by the Fifth and Fourteenth Amendments to the Constitution of the United States; (3) breached their contract with Dr. Harris by, *inter alia,* violating the implied covenant of good faith and fair dealing and by violating Respondent Howard University's own regulations; and (4) tortiously violated Dr. Harris' contract with Respondent Howard University. Said complaint named Howard University, Inc. and certain of its officials as defendants. Respondents removed this matter from the District of Columbia Superior Court to the United States District Court for the District of Columbia.

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[1] A summary of the evidence of Dr. Harris' qualifications for promotion and tenure, and the evidence of the defendant employer's mendacity and pretext for its failure to grant promotion and tenure to Dr. Harris, appears at footnotes 6 thru 8 hereof. However, in keeping with the Rules' admonitions with regard to the purpose of a petition for writ of certiorari, petitioner has refrained from a fuller presentation of the merits of her claim for tenure and promotion and from inclusion of a more complete appendix of supporting exhibits. A more detailed presentation of Dr. Harris' case on the merits and a fuller appendix in support of the allegations made herein, will be made in Dr. Harris' brief and appendix on the merits should, as Dr. Harris prays, this petition for writ of certiorari be granted.

On December 9, 1998, the trial court issued its Initial Scheduling and Procedures Order ("Scheduling Order") which did not take due regard of the agreed upon concerns of the parties as expressed in their 1995 and/or 1998 joint Local Rule 206(d) reports, and which, *inter alia*, set: (a) mediation to begin virtually the same time as the parties' exchange of non-deposition discovery; (b) July 15, 1999, for close of discovery;[2] (c) September 1, 1999, for the filing of dispositive motions; (d) September 15, 1999, for oppositions to dispositive motions; (e) September 22, 1999 for replies to oppositions; and (f) November 18, 1999, for final motions/settlement/status hearing.

Howard was in sole possession of virtually all of the documents relevant to the processing of Dr. Harris' tenure and promotion application and to the proving of Dr. Harris' claims. During the hearing of December 9, 1998, Dr. Harris' counsel expressed concerns that Dr. Harris' ability to meet certain aspects of the trial court's Scheduling Order would be adversely impacted by Howard's failure to forthrightly and timely provide discovery responses.

During a June 22, 1999 status hearing, Dr. Harris' counsel articulated to the Court general and specific concerns regarding Howard's failure to make or cooperate in discovery. At said hearing and subsequently through its law clerk, the district court judge **authorized** the parties to reschedule depositions beyond the July 15th close of discovery. On July 2, 1999, Dr. Harris filed a Request For Hearing on Howard's discovery abuses, and on September 15, 1999 **renewed** said request.

Dr. Harris was deposed on July 15, 1999, and three (3) non-parties subpoenaed out-of-time by Howard were deposed respectively on July 13 or 14, 1999. Dr. Harris timely noticed the depositions of the Howard defendants to be completed on or before July 15, 1999; however, Dr.

Harris, with the prior approval of the district court judge, accommodated the Howard defendants' request that their depositions be delayed due to scheduling problems associated with said defendants' summer vacations, travel plans and work schedules. Dr. Harris was ultimately able to depose each of the Howard defendants, save one. However, the last said deposition was completed on August 31, 1999, just one day before Howard filed its motion for summary judgment.[2]

On September 9, 1999, Dr. Harris timely (six [6] calendar days early) filed a motion for enlargement of time, until 14 days after Dr. Harris' receipt of the transcripts of defendants' deposition testimony within which to respond to defendants' motion for summary judgment.[3] By Order dated September 13, 1999, docketed and postmarked to Dr. Harris'

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[2] The only meaningful distinction between Dr. Harris' and Howard's noticing of their respective depositions is that those persons (including Dr. Harris) noticed by Howard made themselves available within the discovery period despite the fact that they were busy, while the Howard defendants did not. However, notwithstanding his prior and repeated authorization of the deposing of the timely noticed Howard defendants after the discovery deadline, the district court judge: (1) allowed Dr. Harris only 15 days after deposition of the Howard defendants to file her opposition, as opposed to the 49 days allowed to Howard; and (2) compelled Dr. Harris to file her opposition 15 days **before** receipt of the "ordinary" delivery of transcripts for the final deposition of the Howard defendants, as opposed to at least 21 days **after** receipt of required transcripts afforded to Howard.

[3] The most basic concepts of due process and fairplay, as well as, the *McDonnell Douglas* framework, *infra*, required that Dr. Harris be permitted a "full and fair" opportunity to cross-examine the Howard defendants following a reasonable time to review and cite to transcripts of the deposition testimony of the defendants, rather than being compelled to respond to the factual assertions and legal arguments contained in Howard's motion for summary judgment before said contemporaneously ordered transcripts were available to Dr. Harris. *See, e.g.*, Fed. R. Civ. P. 56(e) and (f).

counsel on September 14, 1999, and **first received by Dr. Harris' counsel on late afternoon of September 15, 1999** (approximately 6 hours before the midnight deadline), the trial court **denied** Dr. Harris' motion for enlargement of time (Pet. App. at 25a).[4]

In a good faith effort to comply with the trial court's said Order, Dr. Harris' counsel, on September 15, 1999, hurriedly and without benefit of staff or the transcripts of defendants' deposition, prepared and filed her "Opposition To Defendants' Motion For Summary Judgment".[2, 3] Due to the extremely short notice to Dr. Harris of the trial court's Order, said opposition was filed without exhibits; **however, several exhibits were "referenced" therein, and Dr. Harris under separate heading requested a hearing.**

On October 12, 1999, Dr. Harris filed her, "Supplement To Plaintiff's Opposition To Defendants' Motion For Summary Judgment", "Plaintiff's Statement Of Material Facts As To Which There Exists Genuine Issues To Be Litigated", and voluminous exhibits, and on October 14, 1999, Dr. Harris filed a Table of Contents (including various indexes), a Table of Exhibits, and a request that the Court "construe [Dr. Harris'] motion for reconsideration to be a request to file opposing affidavits and evidence, and to supplement [Dr. Harris'] timely filed opposition to [Howard's] ... motion for summary judgment." Howard filed a supplemental memorandum in reply to Dr. Harris' October 12, 1999, supplemental opposition to defendants' motion for summary judgment.

On or about October 19, 1999, the trial court issued an Order (Pet. App. at 26a-28a): (1) advising that the trial

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[4] The time for Dr. Harris' reply to Howard's opposition to Dr. Harris' said motion had not yet begun to run, much less expired, when the trial court issued said Order.

court had "thorough[ly] review[ed]" Dr. Harris' October 12 and 14, 1999 submissions; (2) accepting for the trial court's consideration, "the 'Affidavit of Mary A. Harris', an Opposing Affidavit included as Exhibit S of" said submissions, and "the 'Deposition of Joyce Ladner' and the 'Deposition of Ian Isidore Smart,' included as Exhibits G and M of" said submissions; (3) **striking the remainder of said submissions; and (4) striking, without explanation, Dr. Harris' timely filed, reply to defendants' opposition to Dr. Harris' motion for enlargement of time.** The trial court supported its allowance of the depositions of Defendants Ladner and Smart, by noting in its said Order that said exhibits were "referenced in [Dr. Harris'] 'Opposition To Defendants' Motion For Summary Judgment'", but, without **explanation, did not allow other deposition and other evidence similarly referenced in Dr. Harris' opposition.** Dr. Harris made further requests of the trial court to consider all of the evidence filed October 12, 1999, which said evidence provided abundant proof of Howard's unlawful discrimination, mendacity, and pretext. The Court rebuffed each of these requests.

On November 17, 1999, Dr. Harris' counsel received a telephone call from the trial court's law clerk advising: (1) that the trial court was "vacating" the settlement/motions/status hearing set, by the Scheduling Order, for the following day, November 18, 1999; and (2) that the trial court would be "back in touch", at some time which the law clerk said was unknown to her, with "further instructions". Dr. Harris' counsel advised that he had been preparing for said hearing, that Dr. Harris still desired a hearing, and that Dr. Harris had outstanding requests for hearings still pending. Dr. Harris' counsel inquired as to whether the hearing being vacated would be rescheduled; whereupon the trial court's law clerk responded that she did not know. **No date for either trial or pretrial has ever been set in this case.**

On November 29, 1999, **more than six (6) weeks after Dr. Harris filed her October 12 & 14, 1999, submissions of evidence** and argument pertinent to Howard's motion for summary judgment and twelve (12) days after vacating the scheduled November 18, 1999 hearing, the trial court issued an Order, "Granting the Defendants' Motion For Summary Judgment as to the Section 1981 Claim; [and] Remanding the Remaining Claims For Further Proceedings". Said Order was supported by a Memorandum Opinion of even date which "conclude[d] that [Dr. Harris] has not established a prima facie case of discrimination under Section 1981", and that Dr. Harris "does not rebut [Howard's] legitimate reasons by offering proof of a pretext." (Pet. App. at 21a-22a).

Subsequent to said Order, Dr. Harris came into information that the district court judge benefited from an extensive and long term employment relationship with Howard as Professor of Law and Director of Howard's Criminal Justice Program immediately preceding said judge's appointment to the bench, and may have had other relationships, affiliations and/or obligations to Howard University and/or its officials. Said relationship[s] were never disclosed on the record.

This matter came before the Court of Appeals for the District of Columbia Circuit on Dr. Harris' timely filed December 21, 1999, Notice of Appeal, from the November 29, 1999, entry of summary judgment by District Court Judge Ricardo M. Urbina in favor of the Howard Defendants, and against Spanish professor Dr. Harris' Civil Rights Act of 1866, (42 U.S.C. Sect. 1981) race and national origin discrimination failure to grant promotion and tenure claim. Despite Dr. Harris' requests, none of the lodged or filed documents once in the district court case jacket was ever transmitted to the appeals court save Dr. Harris' Notice of

Appeal, and documents filed thereafter. *See*, pages 22-23 of this Petition. By a two (2) page May 3, 2000 Order, a panel of the United States Court of Appeals for the District of Columbia Circuit, without further explanation, analysis or discussion, *inter alia*, summarily affirmed the district court's dismissal of Dr. Harris' said claim, stating that, "[e]ven if [Dr. Harris] demonstrated she was qualified for tenure, she did not adequately draw in question [Howard's] evidence of legitimate, non-discriminatory, non-pretextual reasons for denying tenure." In denying Dr. Harris' motion for summary reversal, said May 3, 2000 Order further declared that the trial court, "did not abuse its discretion in denying [Dr. Harris'] motions for leave to file or by striking her non-conforming submissions, rather it properly exercised its discretion to manage its docket", and "did not abuse its discretion by granting summary judgment without holding a hearing." (Pet. App. at 2a-3a). By Order of its Clerk, dated June 27, 2000, the D.C. Circuit denied plaintiff's petitions for rehearing and suggestion of rehearing *en banc* (Pet. App. at 29a-31a).

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT AMONGST THE CIRCUITS WITH RESPECT TO THE QUANTUM OF PROOF OF PRETEXT REQUIRED FOR AN EMPLOYMENT DISCRIMINATION PLAINTIFF TO DEFEAT SUMMARY JUDGMENT.

A number of circuit courts of appeals have cited this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) for the proposition that an employment discrimination plaintiff can always succeed in fending off summary judgment if she can demonstrate a genuine issue of

material fact as to whether the employer's stated reason for its employment decision is the real reason. *See, e.g., Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-72 (3d Cir. 1996) (*en banc*); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 342-47 (6th Cir. 1997); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995). However, other circuit courts have disagreed with this reading of *Hicks*, saying that there are at least some situations in which genuine issues of material fact as to falsity of the emloyer's explanation will not suffice to avoid summary judgment. *See, e.g., Hidalgo v. Overseas Condado Insurance Agencies, Inc.*, 120 F.3d 328, 335-37 (1st Cir. 1997); *Fisher v. Vasser College*, 114 F.3d 1332, 1335-38 (2d Cir. 1997) (*en banc*); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*); *Ryther v. KARE 11*, 108 F.3d 832, 836-37 (8th Cir. 1997) (*en banc*); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1290 (D.C. Cir. 1998) (*en banc*).

This Court recently decided the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.__, 120 S.Ct. 2097, (Docket No. 99-536) (2000). The Court in *Reeves* held that a plaintiff's *prima facie* case for age discrimination, combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination under the ADEA (applying the same standard in an age discrimination case as it applies in all employment discrimination cases). The Court held that the Fifth Circuit, in reversing a jury verdict for the plaintiff, misapplied the standard of review required by Fed. R. Civ. P. 50, and failed to draw all reasonable inferences in the plaintiff's favor. Although the Court in *Reeves* stated that the standard for judgment as a matter of law under Rule 50 "mirrors" the standard for summary judgment under Fed. R. Civ. P. 56, *Reeves*, 120 S.Ct. at 2110, the Court did not

decide the issue raised in the instant case, *i.e.*, whether *prima facie* proof of race and national origin discrimination, coupled with evidence sufficient to support a finding that the employer has not offered its true reason for an adverse employment decision, is sufficient to defeat summary judgment, and permit a jury to decide the factual issues under the framework of *McDonnell Douglas* and its progeny.

There is a significant difference between what the Court decided in *Reeves*, and the issues raised in the instant case. *Reeves* addressed the question of the quantum of proof of pretext that is required **to sustain a jury finding** of liability for intentional discrimination, while the instant case questions the quantum of proof of pretext that is required for an employment discrimination plaintiff **to defeat summary judgment** which would foreclose any jury determination of intentional discrimination, *vel non*. The difference is significant because of Constitutional Seventh Amendment and public policy considerations. *See*, *Adickes v. Kress*, 398 U.S. 142, 158-59 (1970); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Moreover, the split amongst the Circuit Courts of Appeals on this issue require this Court's intervention.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE D.C. CIRCUIT'S DECISION ON AN IMPORTANT FEDERAL QUESTION IN THIS MATTER CONFLICTS WITH THE FRAMEWORK OF *McDONNELL DOUGLAS* AND ITS PROGENY WITH REGARD TO THE RIGHT OF SAID PLAINTIFF TO BE AFFORDED A "FULL AND FAIR" OPPORTUNITY TO REBUT THE EMPLOYER'S EXPLANATION FOR ITS EMPLOYMENT DECISION, AS WELL AS, WITH OTHER IMPORTANT CONSTITUTIONAL AND PUBLIC POLICY CONSIDERATIONS.

The decisions of the trial court and the appellate court panel in this matter also conflict with *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and its progeny (*i.e.*, plaintiff must be given a "full and fair" opportunity to demonstrate by her own case and through "cross-examination" that employer's explanations were in fact a cover up for an unlawfully discriminatory employment decision; no additional proof is required once employer's explanations are shown to be false; plaintiff may not be required to produce direct evidence of discrimination); **and** with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986) (*i.e.*, summary judgment not permitted if, "evidence is such that a reasonable jury could return a verdict for the nonmoving party."; "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial."); **and** with the District of Columbia Circuit's *en banc* decision in *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998) (*i.e.*, employment discrimination plaintiff should not be required to submit evidence over and above rebuttal of employer's explanations of its employment decision to avoid summary judgment; plaintiff's exposure of employer's excuse as false and evidence of mendacity to be given considerable (often great) weight, and to be viewed as favorably to plaintiff as reason will permit; plaintiff to be given "full and fair" opportunity to demonstrate through his own case and through "cross-examination" that discrimination was real reason for employer's action). Consideration by the Supreme Court of the United States is necessary to secure uniformity of the decisions of all the Circuit Courts of Appeals on this issue.

Prima Facie Case. Under the *McDonnell Douglas* framework, a plaintiff must first establish a *prima facie* case of prohibited discrimination. Where, as here, the discrimination is in the context of a failure to grant tenure, a

plaintiff must show that: (1) she belongs to a protected group; (2) she was qualified for tenure; and (3) she was denied tenure in circumstances permitting an inference of discrimination. *Zahorik v. Cornell University*, 729 F.2d 85, 92 (2d Cir. 1984). In the instant matter the trial court held that Dr. Harris alleged sufficient facts to support an inference that she belongs to a racial minority. However, in conflict with this Court's instructions in *Anderson, supra*, and in the face of contrary evidence of record, the trial court held that Dr. Harris had failed to establish that she was qualified for promotion and tenure because she had "Failed To Meet [Howard's] Standards For Research and Publications" (Pet. App. 19a-21a). In support of this holding the judge relied upon requirements for tenure not applicable to Dr. Harris,[5] and overlooked the facts: (1) "that some significant portion [a majority] of the departmental faculty ... [and] other scholars in the particular field hold a favorable view on the question" of Dr. Harris' publications and her fitness for tenure;[6] (2) that

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5 The trial court relied upon parts of a mixed document which were merely "proposed" guidelines **not in existence** when Dr. Harris applied for promotion and tenure, and were **not** in fact requirements for tenure and promotion applicable to Dr. Harris. *See*, Pet. App. at 20a-21a, 2nd full paragraph. At deposition, Dr. Harris testified to this effect and would have done so had the scheduled and/or requested hearing[s] been held. In Exh. F to its opposition to Dr. Harris' Motion For Summary Reversal before the D.C. Circuit, Howard in handwritten notes acknowledges that the district court judge's "finding is suspect b/c it is based upon STDS [standards] that [Dr. Harris] testified were not relevant[,if ever,] until after she applied."

6 The trial court, citing *Zahorik*, 729 F.2d at 93 & 94, held that, "a prima facie case ... is made out by showing that some significant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on the question [of plaintiff's qualifications for tenure]", and that "in this light", Dr. Harris "needs more than the opinion of" Dr. Smart "to make viable plaintiff's claim". (Pet. App. at 20a-21a). However, the record before the trial court reveals that **a majority of the Departmental faculty voted to recommend that Dr. Harris be granted tenure and promotion,** that **no** "scholar in [Dr. Harris'] field wrote

Defendant Ladner admitted that she is **not** qualified to assess the quality of Dr. Harris' publications; (3) that Dr. Harris exceeded the "quantity" requirements for publications; (4) that the only statements in Dr. Harris' tenure file from "scholars" qualified to assess the "quality" of Dr. Harris' research and publications are positive; [6] (5) that "qualitative should take precedence over quantitative measures"; and (6) that Howard Defendants Lee, Ladner and Jenifer, none qualified in Dr. Harris' field, improperly relied upon reasons other than substandard research and publication for their adverse endorsement of Dr. Harris for promotion and tenure. [7]

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anything but **positive statements concerning the "quality" of Dr. Harris' research and publications** during the application process, and that there exists a genuine factual dispute on the **issue of Dr. Harris' qualifications**. In fact, the Departmental APT Committee, acknowledged as the sole Howard University experts in Dr. Harris' field: (1) recommended that Dr. Harris be granted both promotion and tenure; and (2) found no fault with the "quality" of Dr. Harris' publications, but rather, "praised ... [Dr. Harris'] analytical ability" and her "[i]mportant contributions to the study of Twentieth Century literature of Spain."). See, e.g., Pet. App. at 20a (The Faculty Handbook provides that, "scholars in a particular field or activity have the chief competence for judging the work of their colleagues.") (citation omitted).

[7] Evidence permitting an inference of discrimination include: (1) the **deposition testimony** of Dr. Smart in which he evaluates Dr. Harris' qualifications for promotion and tenure in all areas, including research and publication, to equal or exceed those of a least 8 persons granted tenure in Howard's Department of Romance Languages who are not in Dr. Harris' protected class; and (2) the **verified complaint and deposition testimony** of Dr. Harris that she met or exceeded all requirements for promotion and tenure (including the publishing of at least 3 articles and a book which was wholly written in her academic discipline of Spanish, a language not her native tongue, and published by Editorial Pliegos, a publishing house in Madrid, Spain), that her promotion and tenure application was processed, evaluated and re-evaluated in violation of the Faculty Handbook and APT Guidelines, that she did not receive required annual evaluations, that she was lied to by Howard with respect to her tenure application, that she was denied a

In so doing, the trial court did not exercise the appropriate **measure of caution** in this employment discrimination case to consider all of the evidence of record in the light most favorable to Dr. Harris. *See, e.g., Aka v. Washington*, 116 F.3d 876, 879-80 (D.C. Cir. 1997), *vacated o.g.*, 156 F.3d 1284 (D.C. Cir. 1998) ("[A]n added measure of 'rigor', or 'caution' is appropriate [for] ... motions for summary judgment in employment discrimination cases." (citations omitted). Moreover, in discounting Dr. Smart's letter to Defendant Ladner (Pet. App. at 20a-21a) and his

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meaningful and effective opportunity to petition the College APT Committee in violation of Howard's own regulations, that review at the upper levels of the application process was tainted by the discriminatory animus of those at lower levels, that tenure had been granted to White Europeans and African-Americans of comparable or lesser qualifications, and that foreign born persons of African descent have been repeatedly and unlawfully discriminated against in tenure decisions and other incidents of employment. Also in the record is: (1) the recommendation by the Department APT Committee confirming that plantiff did indeed meet the university's standards for research and publications, and attesting to the quality of same (attached as an exhibit to Howard's summary judgement motion): and (2) evidence of Howard's failure to follow its own regulations in Dr. Harris' case, which provide, *inter alia*, that annual evaluations should document the faculty member's progress in research, should provide qualitative indication of adequacy, and "should indicate clearly how the faculty member is progressing" toward tenure.

Additional evidence filed (but excluded from the record) permitting an inference of discrimination includes, *inter alia*: statistical data, additional contemporaneous evidence concerning the quality of Dr. Harris' book, evidence of duplicity by Howard and evidence discrediting Defendants Jenifer's, Ladner's and Lee's assertion that they had no way of knowing Dr. Harris' race and national origin, the importance of translations in Dr. Harris' field of expertise, evidence of prior discrimination by Howard in general and in this department in particular, evidence that upper level officials relied upon reasons other than substandard research and publication and that the process was infected by the discriminatory animus of certain outvoted lower level faculty (*i.e.*, Defendants Donahue and Wallace), and further evidence that no Howard official in the process except department faculty was qualified to assess the quality of Dr. Harris' publications.

deposition testimony and overlooking the majority vote of the departmental faculty, the trial court **impermissibly invaded the province of the jury, or** concluded contrary to *Hicks* and to *Aka* that on the evidence **no jury could reasonably** infer that the true explanation for Howard's actions was unlawful discrimination.[7]

Pretext. In its memorandum opinion of November 29, 1999, the trial court stated that Howard "ha[s] articulated legitimate grounds for denying the plaintiff tenure. Specifically, Howard point[s] out that [Dr. Harris] met only the minimum publication requirements and based her Spanish-language publication almost exclusively upon her English language thesis." In so holding the judge failed to acknowledge, much less give appropriate weight to, Defendant Ladner's admission that the use of one's dissertation for publications is both the norm and proper, and Dr. Smart's testimony that translations, such as those of Dr. Harris, are significant academic accomplishments in Dr. Harris' field of expertise, and the departmental faculty's finding that Dr. Harris' book made "[i]mportant contributions to the study of Twentieth Century Spain".

The trial court then addressed Dr. Harris' "burden of proving a pretext", by stating that,

> "[Dr. Harris] does not state that [Howard's] reasons are a pretext for discrimination. [Dr. Harris] does not rebut [Howard's] legitimate reasons by offering proof of a pretext. Accordingly, [Dr. Harris] has not shown that [Howard] engaged in intentional discrimination."[7,8]

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[8] However, in her timely filed September 15, 1999 opposition to Howard's motion for summary judgment, Dr. Harris "disputes the pretextual assertions that [Defendant Ladner] based her decision

Similarly, upon consideration of Howard's motion for summary affirmance, the panel asserted that Dr. Harris, "did not adequately draw in question [Howard's] evidence of legitimate, non-discriminatory, non-pretextual reasons for denying tenure." (Pet. App. at 2a). Notwithstanding, **the record contains credible evidence attacking Howard's proffered explanations as pretextual, sufficient for a reasonable jury to infer that the real reason for Howard's failure to grant Dr. Harris promotion and tenure was unlawful discrimination.**[6,7,8] It is in this determination as the basis for granting summary judgment against Dr. Harris that the trial court and the panel clearly are in conflict with this Court's decisions in *Hicks, supra*, and in *Anderson, supra.*

In interpreting *Hicks*, this Court's 1993 explication of the *McDonnell Douglas* framework, the D.C. Circuit stated:

> Assuming then that the employer has met its burden of producing a nondiscriminatory reason for its actions, the focus of proceedings at trial **(and at summary judgment)** will be on **whether the jury could infer discrimination from the combination of** (1) the plaintiff's *prima facie* case; (2) any evidence the plaintiff presents to attack the employer's proffered explanations for its actions; and (3) any further

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regarding [Dr. Harris'] tenure application on her research output and quality" and asserts that "[Defendant] Ladner's decision was based primarily upon the **duplicitous** comments contained in [Defendant] Lee's recommendations which in turn were at least, in part based upon the discriminatory animus of Defendant Wallace, then Department Chair, and upon the recommendation of the College APT Committee which was based at least in part on the discriminatory animus of Defendant Donahue" (emphasis added).

> evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer) or any contrary evidence that may be available to the employer (such as evidence of a strong track record in equal opportunity employment). **That is not to say that every plaintiff must always present evidence in each of the categories in order to avoid summary judgment.** In this case, [plaintiff] has presented evidence in the first two categories, but neither [plaintiff] nor [defendant] has presented any evidence in the third. **We are therefore faced with the issue of when evidence in categories (1) and (2) alone can suffice ..., to prevent summary judgment for the defendant.**

Aka, 156 F.3d at 1289 (footnote omitted, emphases added). The D.C. Circuit, *en banc*, explained further that in determining whether a plaintiff's *prima facie* case and her evidence attacking the employer's proffered explanation as pretextual is sufficient to avoid summary judgment, evidence tending to discredit the employer's explanation "is entitled to considerable weight" (*id.* at 1290) because such evidence "**eliminates the principal nondiscriminatory explanation for the employer's actions.** Events have causes; if the only explanations set forth in the records have been rebutted, **the jury is permitted to** search for others, and may in appropriate circumstances **draw an inference of discrimination.**" *Id.* at 1292 (emphasis added). Moreover, the D.C. Circuit "**reject[ed] any reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment.**" *Id.* (emphasis added).

Clearly, the evidence of record noted hereinabove, if believed as it must be for summary judgment purposes, discredits Howard's explanation that Dr. Harris was denied tenure because of substandard research and publications, and provides evidence of Howard's mendacity which increases the likelihood of intentional discrimination in this case. *Id.* at 1294. Furthermore, neither of the two exceptions cited in *Aka* (at 1291) is here applicable, and there is no evidence that, "the material questions [here present] as to whether [Howard] has given the real explanation [should] not suffice to support an inference of discrimination." It is thus apparent that the trial court and the panel failed to give the "great" evidentiary weight that must be accorded to Dr. Harris' exposure of Howard's explanation as false, and/or incorrectly assumed that Dr. Harris must do more than discredit Howard's explanation in order to avoid summary judgment. "That assumption we think would be inconsistent with *Hicks,* which makes clear that 'no additional proof of discrimination is required' as a matter of course once a plaintiff has shown that a jury could reject the employer's proffered explanation." *Id.* (citations omitted).

"Full and Fair" Cross. In addition to overlooking or ignoring evidence of record which establishes a *prima facie* case of discrimination and tends to both disprove the employer's proffered explanation and demonstrate that said explanation is a pretext for discrimination, the trial court, *inter alia*: (1) **unfairly** failed to consider on the record or grant a hearing on Dr. Harris' complaints about the defendants' discovery abuses notwithstanding Dr. Harris' requests for such hearing;[2] [3] **and** (2) **unfairly** denied Dr. Harris' motion for enlargement of time to file her opposition to Howard's motion for summary judgment; **and** (3) **unfairly** denied Dr. Harris' attempts to supplement her timely filed but necessarily rushed opposition to Howard's motion for summary judgment; **and (4) unfairly** denied Dr. Harris' request for a hearing. The D.C. Circuit sanctioned said **unfair** acts as a, "proper[] exercise[] of [the

trial court's] discretion to manage its docket." Pet. App. at 2a.

However, a trial court's discretion to manage its docket must be balanced against public policy considerations encompassed in the procedural framework constructed by *McDonnell Douglas* and its progeny for analysis of employment discrimination claims. In *Hicks*, this Court made clear that the function of the *prima facie* case is to compel the employer to produce evidence that the adverse employment actions were taken for a legitimate nondiscriminatory reason. Once the employer has done so, the presumption of discrimination raised by the *prima facie* case is rebutted. Then, the plaintiff, "has 'the full and fair opportunity to demonstrate,' through presentation of his own case and **through cross-examination of the defendant's witnesses,** 'that the proffered reason was not the true reason for the employment decision,' and that race was." *Id.* at 507-508, quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (emphasis added; citation omitted). Thus, a "full and fair opportunity" for cross-examination is an indispensable element of the *McDonnell Douglas* framework for **without it an employer's mere articulation of a legitimate, non-discriminatory reason for its employment decision (true or false) would moot any discrimination claim, no matter how worthy**. *See, Burdine* at 255 and n.10. *See also, e.g., McDonnell Douglas,* 411 U.S. at 805 ("on the retrial respondent **must be given a full and fair opportunity** to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover up for a racially discriminatory decision.") (emphasis added); and *Reeves*, 120 S.Ct. at 2106 ("the plaintiff--once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision--**must be** afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a

pretext for discrimination.'") (emphasis added; citations omitted). *See also*, *Aka*, 156 F.3d at 1289. In its Order, the panel of the D.C. Circuit apparently misapprehended or overlooked the necessity of this critical element to the viability of the *McDonnell Douglas* framework.

The instant case raises the questions of: (1) whether, in an employment discrimination case, the right of the employee to a "full and fair" opportunity for cross-examination/rebuttal of the employer's witnesses is an indispensable element of the *McDonnell Douglas* framework which must be afforded the employee; (2) whether, in passing on a motion for summary judgment as a matter of law under Federal Rule 56, a court considers all of the evidence or only the evidence favorable to the party against whom judgment is sought and evidence favorable to the moving party that a jury is compelled by law to accept; (3) by what means is a plaintiff in an employment discrimination case permitted to cross-examine her employer's witnesses and proferred explanation **at the summary judgment stage**; and (4) whether, in passing on a motion for summary judgment in an employment discrimination case, a court has impermissibly denied an employee a "full and fair" opportunity to cross-examine/rebut the employer's proffered explanation for its employment action, WHERE, more than six (6) weeks before the court's grant of summary judgment, the employee submitted by supplemental filing, evidence which tends to both disprove the employer's proffered explanation and demonstrate that said explanation is a pretext for discrimination (*See, e.g.*, Fed. R. Civ. P. 56(e) and (f)); **and** WHERE, more than ten (10) weeks before the court's grant of summary judgment, the employee timely requested an enlargement of time to respond to the employer's motion for summary judgment because transcripts of the employer's deposition testimony were not available by the due date set for said response in the court's Scheduling Order, *id.*; **and** WHERE, the deadline set in the court's Scheduling Order for

completion of discovery, had been extended, with the court's approval, to accommodate the employer defendants' inability to timely comply with the employee's timely notices of deposition; **and** WHERE, the court failed to hold hearings timely requested by the employee with respect to the employer's discovery abuses, and otherwise impeded the lodging of any motion to compel by employee; **and** WHERE, the court both refused to hold a hearing on the employer's summary judgment motion notwithstanding the employee's timely request for same and Federal Rule 56's anticipation of same, and cancelled a motions hearing set in said Scheduling Order one day before said hearing was scheduled to take place, thereby precluding both the employee's cross-examination of employer defendants at hearing and the offering into evidence at hearing of rebuttal evidence known by the trial court to be in existence; **and** WHERE, there had been no pre-trial or trial date set or other compelling time constraints; **and** WHERE, the trial court judge failed to disclose on the record, *inter alia*, his seven (7) year full time prior employment with the defendant employer.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE D.C. CIRCUIT'S DECISION HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY THE TRIAL COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Consideration by the Supreme Court is also required to cure gross procedural injustices by which: (1) the appellate panel considered, *de novo*, Howard's summary affirmance motion without oral argument or briefing and without benefit of pertinent parts of the district court record including, *inter alia*, [Howard's] Motion For Summary Judgment, Dr. Harris'

verified complaint and Howard's answer thereto; notwithstanding Dr. Harris' requests that the complete record be retrieved for the panel's use; (2) the district court denied to Dr. Harris, by certain grossly **unfair** procedural rulings, *supra,* an **indispensable** element of the *McDonnell Douglas* framework, to wit: a "full and fair" opportunity to demonstrate by her own case and through "cross-examination" that the defendants' explanations were in fact a coverup for an unlawfully discriminatory employment decision"; and (3) the district court judge failed to make his long term full time employment, etc. with Howard (the defendant employer) part of the record and/or to recuse himself.

Record On Appeal. Appellate review of summary judgment is *de novo. See, e.g., Tao v. Freeh*, 27 F.3d 635 (D.C. Cir. 1994). However, **it appears that the appeals panel reviewed Howard's summary judgment motion without benefit of said motion or other pertinent documents once in the district court's record.** In its November 29, 1999 Order granting Howard's motion for summary judgment on Dr. Harris' 42 U.S.C. Sect. 1981 claim, the trial court remanded Dr. Harris' common law claims to the Superior Court of the District of Columbia ("Sup. Ct."). On December 11, 1999, pursuant to said Order, the district court sent its entire file to the Sup. Ct. where it has continuously remained ever since. Furthermore, earlier Orders of the district court, compelled the return to Dr. Harris' counsel of certain documents filed by Dr. Harris. Thus, the district court maintained an incomplete file after sending portions of its file back to Dr. Harris' counsel and sending the remainder of its file to the Sup. Ct., and said incomplete file was signed out to the appeals panel. Despite Dr. Harris' attempts to have the entire file retrieved from the Sup. Ct. and from her counsel for the appeal before the D.C. Circuit, the only parts of the trial record available to the panel

were Dr. Harris' Notice of Appeal (12/11/99), and documents filed thereafter.

Oral Argument. In conflict with the mandate of the Federal Rules of Appellate Procedure that, "[o]ral argument must be allowed in every case", the appellate panel summarily and on the merits disposed of this case without oral argument, without briefs and without the full record. Fed. R. App. P. 34(a)(2).

Management Of Court's Docket. The appeals panel cited *Spark v. Catholic University of America*, 510 F.2d 1277 (D.C. Cir. 1975) as authority for its holding that the trial court did not abuse its discretion by granting summary judgment without holding a hearing (Pet. App. at 3a). In so holding the panel misapprehended and/or overlooked the law and the facts of this case. Unlike *Spark*, (1) the instant case is focused on disputed issues of material fact regarding an employment discrimination matter in which extra caution and a full and fair opportunity for cross-examination is required, and is not focused on a question of law regarding subject matter jurisdiction, and (2) Dr. Harris' voluminous supplemental filing, most of it stricken by the trial court, provided ample showing that oral hearing would have produced further evidence to enable the trial court to determine that summary judgment must not lie, something not so evident in *Spark*.[5] [7] Furthermore, Fed. R. Civ. P. 56 presumes a hearing (*see*, subsections (c) and (d) thereof), and *Spark* implies that when considering summary judgment, dispensing with a hearing should be the exception rather than the rule.

Moreover, the requirement of the *McDonnell Douglas* framework that an employment discrimination plaintiff must be given a "full and fair" opportunity to cross-examine her employer's witnesses and proffered reasons for

its employment action, must govern the proper exercise of a district court judge's discretion to manage its docket.

Appearance Of Partiality. Since filing her Notice of Appeal, Dr. Harris has obtained evidence that the district court judge (J. Urbina) was a full time employee of Defendant employer Howard University for at least seven (7) years immediately prior to his appointment to the bench, and may have had other connections to Howard University and its officials. This fact was not made part of the record in this matter and may have played a role in said judge's improper dismissal of Dr. Harris' complaint in 1995 (*see, Harris v. Ladner,* 127 F.3d 1121 (D.C. Cir. 1997)) and/or said judge's unfair procedural rulings; and/or said judge's instant grant of summary judgment in favor of Howard and against Dr. Harris (*see,* Pet. App. at 4a-28a). In any event, the fact that such an extensive and extended relationship with **the key defendant** in this case (the defendant/employer with whom **all** other defendants were employed during the incidents complained of) was not fully disclosed on the record as required by law, when combined with said judge's apparent abuses of discretion, errors of law and incomplete and/or misleading statement of fact favoring Howard and disfavoring Dr. Harris, has left Dr. Harris with the reasonable feeling that she has been denied her **fair** day in court and has been the victim of judicial partiality. *See, e.g.* 28 U.S.C., Section 455(a), (b)(1) and (e).

CONCLUSION

This case presents important questions on the respective roles of the judge and the jury in employment discrimination cases, as well as, what is required to fend off summary judgment in such cases. The courts of appeals are in conflict on these issues, the D.C. Circuit is in conflict with the mandates of *McDonnell Douglas* and its progeny, and important public policy considerations need resolving.

Further, serious problems with the processing of this case by both the district and appeals courts require this Court's supervision. Thus, this petition for a writ of certiorari warrants granting.

Respectfully submitted,

Clifford Andrew Brooks
Attorney for Petitioner
Brooks and England
7722/304 Hanover Parkway
Greenbelt, Maryland 20770
(301) 441-2224

Dated: September 25, 2000

APPENDIX A

(Any footnotes trail end of each document)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mary A. Harris, Appellant v. Joyce A. Ladner, et al., Appellees

No. 99-7274 Consolidated with 00-7018

May 3, 2000, Filed

JUDGES:
BEFORE: Williams, Randolph, and Rogers, Circuit Judges.

ORDER

Upon consideration of the motion for enlargement of time to file reply to the opposition to the motion for summary reversal and opposition to the motion for summary affirmance, construed as a motion for leave to file, and the opposition thereto; the motion for summary reversal, the opposition thereto, and the lodged reply; and the motion for summary affirmance, the lodged opposition thereto, and the lodged reply, it is

ORDERED that the motion for leave to file a reply and opposition be granted. The Clerk is directed to file the lodged documents. It is

FURTHER ORDERED that the motion for summary affirmance of that portion of the district court's order filed November 19, 1999, granting summary judgment in favor of appellees on the *42 U.S.C. § 1981* claim, be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)* (per curiam); *Walker v. Washington, 627 F.2d 541, 545* (D.C. Cir.) (per curiam), *cert. denied, 449 U.S. 994 (1980).*

The district court properly granted summary judgment in favor of appellees. To establish a prima facie case where tenure has been denied, a party is required to prove: (1) she is a member of a protected class; (2) she applied for and was qualified for tenure; and (3) she was not granted tenure in circumstances permitting an inference of discrimination, *see, e.g., Tanik v. Southern Methodist Univ., 116 F.3d 775 (5th Cir. 1997),* or tenure slots were open and others were granted tenure in a period relatively close in time to the party's tenure denial. *See, e.g., Banejee v. Board of Trustees of Smith College, 648 F.2d 61, 62 (1st Cir. 1981).* Even if appellant demonstrated she was qualified for tenure, she did not adequately draw in question appellees' evidence of legitimate, non-discriminatory, non-pretextual reasons for denying tenure. *See Aka v. Washington Hosp. Center, 156 F.3d 1245, 1290 (D.C. Cir. 1998)* (en banc). It is

FURTHER ORDERED that the motion for summary reversal be denied. The district court did not abuse its discretion in denying appellant's motions for leave to file or by striking her non-conforming submissions, rather it properly exercised its discretion to manage its docket. *Cf. Jackson v. Finnegan, Henderson, Farabow, Garrett &*

Dunner, 101 F.3d 145 (D.C. Cir. 1996). The district court also did not abuse its discretion by granting summary judgment without holding a hearing. *See Spark v. Catholic University of America, 510 F.2d 1277 (D.C. Cir. 1975).* It is

FURTHER ORDERED, on the court's own motion, that portion of this court's order filed January 19, 2000, consolidating No. 99-7274 and No. 00-7018 be vacated.

The Clerk is directed to withhold issuance of the mandate in No. 99-7274 until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mary A. Harris, Plaintiff v. Joyce A. Ladner, et al., Defendants

C.A. No. 95-1111

Document Nos.: 49,53,55

11/29/99, Filed

ORDER

Granting the Defendants' Motion for Summary Judgment as to the Section 1981 Claim; Remanding the Remaining Claims For Further Proceedings

For the reasons stated in the court's Memorandum Opinion separately and contemporaneously executed this 29th day of November, 1999, it is hereby

ORDERED that the defendants' motion for summary judgment is GRANTED as to the plaintiff's federal claim brought pursuant to 42 U.S.C. §1981; and it is

FURTHER ORDERED that the plaintiff's remaining claims are REMANDED to the District of Columbia Superior Court for further proceedings; and it is

ORDERED that the above-captioned case stands DISMISSED from the Court's docket.

SO ORDERED.
Hon. Ricardo M. Urbina
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 95-1111

Mary A. Harris, Plaintiff v. Joyce A. Ladner, et al., Defendants

11/29/99, Filed

MEMORANDUM OPINION

Granting the Defendants' Motion for Summary Judgment as to the Section 1981 Claim; Remanding the Remaining Claims For Further Proceedings

I. INTRODUCTION

This case originated as an action in the District of Columbia Superior Court and was removed to this court pursuant to 28 U.S.C. § 1441. The plaintiff appealed this court's dismissal of the complaint, and the United States Court of Appeals for the District of Columbia Circuit remanded the case after holding that dismissal under Rule 12(b)(6) was improper. The plaintiff seeks the court's consideration of her claim that Howard University wrongfully denied her tenure and promotion in violation of 42 U.S.C. § 1981 ("Section 1981"). The plaintiff also charges that the defendants breached her employment contract,

misrepresented material facts in the tenure and promotion application process, interfered with her contract and violated the common-law right of fair procedure. The defendants respond by asserting that the plaintiff's allegations are time-barred or, alternatively, that the plaintiff's case fails to make the requisite prima facie showing.

Upon consideration of the parties' submissions. the applicable law and the entire record herein, the court concludes that the plaintiff has demonstrated that a genuine issue of fact exists as to whether the plaintiff's federal claim is time-barred. The court further concludes, however, that the plaintiff has failed to establish a prima facie case of racial discrimination under 42 U.S.C. §1981. Accordingly, the court grants the defendants' motion for summary judgment on the Section 1981 claim. Moreover, the court remands the remaining claims to Superior Court for further proceedings.

II. BACKGROUND

The plaintiff, a Guyanese-born, Black female was hired by Howard University on a probationary appointment as an Assistant Professor of Spanish in August, 1985. (Second Am. Compl. ¶¶ 2, 13). The plaintiff applied for promotion to the position of associate professor and for tenure in October 1989. (Id). The Appointments, Promotions and Tenure Committee of the Department of Romance Languages ("Departmental APT Committee") denied her petition at that time. (Id).

The Departmental APT Committee informed the plaintiff that she could reapply for promotion and tenure. but should publish either five additional articles or one book. (Id.

¶¶ 15-16). The plaintiff reapplied in October. 1990, within a year after her application was first denied. (Id. ¶ 17). By now the plaintiff had completed a book on poetry. The Departmental APT Committee and the Chairman of the Romance Languages Department reviewed the plaintiff's second application and forwarded it to the APT Committee of the College of Arts and Sciences ("College APT Level") with the recommendation that she be promoted and given tenure.

While in committee at the College APT level, the plaintiff's application was rejected for the second time. (Id. ¶19-20). Following that committee's review. Dr. Clarence Lee, the Acting Dean of the College ("Dean Lee"), endorsed the plaintiff's second application, albeit with great reservation. (Id.). However, Joyce A. Ladner, the Vice President of Academic Affairs, cast her recommendation against the plaintiff's second application for promotion and tenure. The final blow came on October 31, 1991, when Dean Lee told the plaintiff that the President of the university had denied her second application. (Id. ¶ 24; Def. Mot. for Summ. J. Ex. 24).

The plaintiff was now in the final year of her six-year appointment as an assistant professor and was faced with the reality of imminent departure from the university. She sought the assistance of James Davis, the Acting Chair of the Department with which she was affiliated.

In December, 1991, Mr. Davis told the plaintiff that she had the right to demand reconsideration of the decision denying her promotion and tenure. The plaintiff subsequently resubmitted her application for tenure and promotion, along with two letters of recommendation and a copy of her then-published book on poetry. (Id. ¶ 29; 2d Am. Compl. ¶ 26).

In a letter dated January 9, 1992, Vice-President Ladner "confirmed that the plaintiff's application for tenure would be re-evaluate[d] pursuant to the guidelines established for petitions of reconsideration. and that [Vice-President Ladner] would inform Dean Lee of President Jenifer's decision" once the reconsideration process had progressed. (Id. ¶ 31) (internal quotations omitted).

The exercise in reconsideration was to no avail; at the denouement, the University reaffirmed its original decision to deny the plaintiff promotion and tenure. Dean Lee informed the plaintiff that her application for reconsideration had been denied in a letter dated March 25, 1992. Specifically, he told the plaintiff:

> All pertinent supporting documents and relevant factors in your case were carefully evaluated. It is however, my unpleasant task to inform you that no basis was found upon which to change the original recommendation, namely that promotion and tenure be denied to you.

(Id. ¶ 36; Def. Mot. for Summ. J., Ex. 25).

The plaintiff subsequently filed her first court action on March 24, 1995. The district court dismissed the original complaint, the plaintiff appealed and the D.C. Circuit reinstated all but the constitutional claims in its October 31, 1997 decision. Thereafter, the plaintiff brought the instant action and the defendants filed a motion for summary judgment on September 1, 1999.

III. DISCUSSION

A. Legal Standard for Summary Judgment

Summary judgment is appropriate where there is no genuine issue in dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). To determine which facts are "material," a court must look to the substantive law upon which each claim rests. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one that consists of a dispute over facts that could establish an element of the particular claim and, therefore, affect its outcome. *See Anderson*, 477 U.S. at 248: *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *See Anderson*, 477 U.S. at 255. However, the nonmoving party must establish more than "the mere existence of a scintilla of evidence" in support of its position. Id. at 252. In determining whether there is sufficient evidence for a jury to find in the nonmovant's favor, a court may properly consider "pleadings, depositions, answers to interrogatories . . . admissions on file, [and] . . . affidavits." Fed. R. Civ. P. 56(c). The court may also consider declarations. *See Catrett v. Johns-Mansville Sales Corp.*, 826 F.2d 33, 38 n.11 (D.C. Cir. 1987).

To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an

element essential to that party's case, and on which that party will bear the ultimate burden of proof at trial." *Celotex*, 477 U.S. at 322, 325. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *See id.* at 325.

The nonmoving party may not rely solely on allegations or conclusory statements. *See Greene v. Dalton*, 164 F.3d 671, 674 (D.C. Cir. 1994). Rather, the nonmoving party "must come forward with specific facts" which would enable a jury to reasonably find in its favor. *See id.* If the evidence "is merely colorable, or is not significantly probative, summary judgment may not be granted." *Celotex*, 477 U.S. at 249-50 (internal citations omitted).

Finally, the D.C. Circuit has observed that because it is difficult for a plaintiff to establish proof of discrimination, the court should view summary judgment motions in such cases with special caution. *See Aka v. Washington Hosp. Ctr.*, 116 F.3d 876, 879 (D.C. Cir. 1997), vacated o.g., 156 F.3d 1284 (D.C. Cir. 1998); *Johnson Digital Equip. Corp.*, 836 F. Supp. 14, 18 (D.D.C. 1993).

B. Compliance With Local Rule 7.1(h).

As a preliminary matter. the court will construe the plaintiff's opposition to defendant's motion for summary judgment as a submission that complies with Local Rule 7.1(h. The circumstances surrounding the plaintiff's submission of her opposition warrant brief discussion insofar as they are relevant to this court's threshold willingness to visit ihe merits of the plaintiff's claim.[1]

Rule 7.1(h) of the United States District Court for the District of Columbia ("Local Rule 7.1(h)") sets forth the requirements for filing motions for summary judgment in federal court. *See* LCvR 7.1(h). Rule 7.1(h) requires a party opposing summary judgment to file a "Statement of Material Facts" that refers to specific portions of the record and, within this statement, to controvert facts which the opposing party does not want admitted. This circuit has held that a court may strike nonconforming oppositions from the record for failure to comply with Local Rule 7.1(h). *See Jackson v. Finnegan, Henderson, Garrett & Dunner*, 101 F.3d 145. 150 (D.C. Cir. 1996).

On September 9, 1999, the plaintiff filed a motion for an extension of time in which to file an opposition to the defendants' motion for summary judgment ("Motion for Time"). The plaintiff claimed that "it [was] imperative that [the] plaintiff be able to review and cite to transcripts or the deposition testimony of the defendants." (Mot. for Time at 4). In light of the plaintiff's failure to articulate good cause for her dereliction and in view of the repeated requests for extensions in this case, this court denied the plaintiff's Motion for Time by Order dated September 13, 1999.

Two days later, after the court had denied the extension of time, the plaintiff filed a "Reply" to the defendants' opposition to the Motion for Time, on the mistaken assumption that this court would view the Motion for Time as a substantive motion that merited a reply. Also on that date, perhaps unaware that the court had denied leave to late file or, perhaps assuming that this court would grant the request for extension of time, the plaintiff filed a

perfunctory but timely opposition to the defendants' motion for summary judgment ("Opposition"). The Opposition did not technically comply with Local Rule 7.1(h) because it did not include a statement of material facts that referenced the record and controverted relevant facts. Nonetheless, the Opposition responded paragraph-by-paragraph to the defendants' assertions and otherwise was formatted as if it were intended to comply with the rule.

On September 29, 1999, soon after submitting its Opposition, the plaintiff filed a motion for reconsideration of the order denying her Motion for Time. This court responded by granting the plaintiff leave to file affidavits to supplement its Opposition in accordance with Federal Rule of Civil Procedure 6(d).

In lieu of complying with the court's order. the plaintiff filed voluminous submissions that did not constitute opposing affidavits. The overwhelming majority of the plaintiff's submissions consisted of material to which the plaintiff never referred in its Motion for Time. Despite the plaintiff's attempt to circumvent the court's Order, on October 19, 1999 the court thoroughly reviewed all the submissions and identified the lone opposing affidavit among the submissions. The court further supplemented its consideration of the Opposition by including materials previously referred to in the plaintiff's timely submissions.

Because Local Rule 7.1(h) does not require the Statement of Material Facts to be labeled in a particular manner, and since the plaintiff was given leave to file supplemental affidavits, this court will construe the plaintiff's Opposition as a submission that complies with Rule 7.1(h), *cf*

Stanwood v. Welch, 922 F. Supp. 635, 637 n.1 (D.D.C. 1991) (striking a non conforming opposition where the non-moving party had failed to attach an affidavit), so as to accord the plaintiff an opportunity to be heard on the merits.

C. Section 1981

1. Statute of Limitations

As grounds for summary judgment. the defendants allege that the plaintiff's Section 1981 claims arc time-barred. For the reasons that follow, the court concludes that a genuine issue of fact remains as to whether the statute of limitations has expired on the Section 1981 claim.

Courts of this circuit apply the District of Columbia's three-year statute of limitations for personal injury suits to claims of racial discrimination under Section 1981. *See, e.g.*. *Banks Chesapeake and Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986); *see also Johnson v. Railway Express Agency Inc.*, 421 U.S. 454, 462 (1975) (noting that Congress did not equip Section 1981 with its own statute of limitations and that courts must apply the most analogous state statute). The statute of limitations commences once the university makes and communicates a final tenure decision to the applicant. *See Delaware State College v. Ricks*, 449 U.S. 255, 259 (1980); *Harris v. Ladner*, 127 F.3d 1121, 1125 (D.C. Cir. 1997).

The plaintiff argues that the statute of limitations has not yet been triggered because the university has not made and communicated a final tenure decision as required by its own regulations. (*See* P1. Opp. ¶ 10; Ladner Dep. at 21). The

defendants disagree. (*See* Lee Decl. ¶ 6). The parties agree, however, that tenure decisions are governed by the university's internal policies as delineated in two sources: the Guidelines for Appointments, Promotions, and Tenure Committees ("Guidelines") and The Howard University Manual, Faculty Handbook Section ("Faculty Handbook"). (2d Am. Compl. ¶ 13: Def. Mot. for Summ. J. at 4-5). Accordingly, the court will apply contract principles to determine whether the limitations period has commenced.

"In the area of contract interpretation, the existence of a genuine issue of material fact generally turns on whether or not the contract is ambiguous." *Kakaes v. George Washington Univ.*, 683 A.2d 128. 132 (D.C. 1996). The court may not grant summary judgment on a matter of contract interpretation unless the plain language of the agreement unambiguously supports the defendants' interpretation. *See id.*

The Faculty Handbook states that "the *Board of Trustees* will grant indefinite tenure... [among other things,] after the application has been approved and recommended by the President of the University..." (Faculty Handbook at 42) (emphasis added). The Policy on Tenure included within the Faculty Handbook states that "the Vice-President shall forward the recommendations to the President of the University for presentation to the Board of Trustees." (*Id.* at 66). The Faculty Handbook concludes that "[t]he decision of the Board shall be final." (*Id.*).

The defendants argue that the plaintiff's claim is time-barred because the statute of limitations accrued when the President made and communicated his decision on March

25, 1992. The plaintiff appears to argue that the statute of limitations never commenced because the Board never acted. The defendants respond that the Board delegated its authority over all tenure applications to the President as a matter of custom and practice.

District of Columbia courts have held that "expiration of the statute of limitations is a question of law but certain facts must be determined before the question of law can be reached." *See Spellman v. American Security Bank*, 504 A.2d 1119, 1123 (D.C. 1986). Based on the plain language of the Guidelines and Faculty Handbook, a reasonable jury could conclude that the limitations period never started running because the President and not the Board made the final decision. The defendants appear to have ignored that plain language in alleging that custom and usage guided their actions. The record is devoid of argument or evidence that the Guidelines or the Faculty Handbook contained ambiguous language that could support the defendants' custom-and-usage-based interpretation. *See Kakaes*, 683 A.2d at 132 (internal citations omitted): *cf, Howard University v. Best*, 484 A.2d 958, 967 (D.C. 1984) (if "the meaning of...disputed language in a contract is open to several reasonable interpretations in view of a usage or custom, the issue of whether a party knew or had reason to know of a usage would present a question of fact for the jury.").

The court finds that the defendant has not established that a final decision was made and communicated; consequently, the court concludes that a genuine issue of material fact remains as to whether the statute of limitations was triggered. Accordingly, the court will not dismiss the

Section 1981 claim as being time-barred at this phase of the litigation.

2. Discriminatory Denial of Tenure and Promotion Under Section 1981

The plaintiff has alleged that she was denied tenure and promotion because of her race and national origin in violation of Section 1981. A plaintiff alleging racial discrimination under Section 1981 has the initial burden of establishing a prima facie case of discrimination. *See Frazier v. Consolidated Rail Corp.*. 851 F.2d 1447, 1449 (D.C. Cir. 1998). The plaintiff must also show that the employer awarded promotions and tenure to applicants with the plaintiff's same qualifications for the time period before and after rejecting the plaintiff. *See See Metrocare v. Washington Metro. Area Transit Auth.*, 679 F.2d 922, 925 (D.C. Cir. 1982). Finally, the plaintiff must show that the employer engaged in intentional discrimination. *See Frazier*, 851 F.2d at 1449 n.3; *Webb v. District of Columbia*, 864 F. Supp. 175, 180 (D.D.C. 1994) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989)).

Once the plaintiff establishes a prima facie case under Section 1981, the burden shifts to the defendant to articulate legitimate reasons for the allegedly discriminatory treatment. *See Frazier*, 851 F.2d at 1449. The plaintiff may then rebut that evidence with proof that the defendants' stated reasons were merely pretextual. *Id.; Webb*, 864 F. Supp. at 180 (the burden-shifting "framework of proof initially

established in Title VII cases, applies equally to claims of discrimination under Section 1981.").

a. The Prima Facie Case

To establish a prima facie claim of racial discrimination, the plaintiff must: (I) belong to a racial minority; (2) have applied for and been qualified to receive promotion and tenure; and (3) have been rejected, despite sufficient qualifications. *See Metrocare*, 679 F.2d at 925; *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981); *Nayar v. Howard Univ.*, 881 F. Supp. 15 (D.D.C. 1995).

(i) Plaintiff Belongs to a Racial Minority

The plaintiff alleges discrimination based on a combination of race and national origin. The defendants appear to argue that because the plaintiff is "Black" and "Guyanese" and the defendants are largely African-American, the plaintiff is not a member of a racial minority and is necessarily asserting a claim based instead on her national origin.

Section 1981 does not provide a remedy for discrimination based solely on national origin. *See Saint Francis College v. Al-Khazrafi*, 481 U.S. 604. 616 (1987); *Kurylaw v. U.S. Dept. of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974), aff'd without op., 514 F.2d 894 (D.C. Cir. 1975). Courts, however, have recognized the viability of claims alleging racial discrimination between members of the same race based on ancestry or ethnic characteristics.[2] *See Francheschi v. Hyatt Corp.*, 782 F. Supp. 712 (D.P.R. 1992);

Cuello-Suarez v. Autoridad de Energia Electrica de Puerto Rico, 737 F. Supp. 1243, 1247-1249 (D.P.R. 1990) (refusing to grant a motion to dismiss in a case where a Puerto Rican allegedly discriminated against a Dominican national); *see also Walker v. IRS*, 713 F. Supp. 403 (N.D. Ga. 1989). *But see Sere v. Bd. of Trustees of the Univ. of Illinois*, 628 F. Supp. 1543, 1546 (N.D. 111, 1986) (refusing to apply Section 1981 to intra-racial discrimination case in the absence of specific authority). Other courts have observed that Congress did not intend to limit Section 1981's application exclusively to race-based discrimination by members of the white race. *See id; McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (involving alleged discrimination against a white person in favor of a black person). Moreover, the Supreme Court has observed that the distinction between race and national origin is not crystal clear. *See Saint Francis College*, 481 U.S. at 616.

Viewing the evidence in the light most favorable to the plaintiff, the court concludes that the plaintiff has alleged sufficient facts to support an inference that she belongs to a racial minority.

(ii) Plaintiff Failed to Meet the University's Standards For Research and Publications

It is undisputed that the plaintiff applied for and was denied promotion and tenure. The dispute between the parties implicates the issue of plaintiff's qualifications for promotion and tenure. The defendants identify the plaintiff's failure to meet the university's standards for research and publications as proof that the plaintiff was not qualified for the position.

The plaintiff offers excerpts from her own deposition and the deposition of her colleague, Mr. Isadore Smart ("Mr. Smart"), as evidence that she was qualified to be promoted and tenured.

Research and publications are the most heavily weighted factors in the review of an applicant's qualification for promotion and tenure. (*See* Guidelines at 4 ("The most significant factor in the evaluation of junior faculty is the potential for research and publications of high quality and significance.")). The Faculty Handbook provides that "scholars in a particular field or activity have the chief competence for judging the work of their colleagues." (*See* Faculty Handbook at 40).

To meet the minimum requirements for tenure, an applicant must publish at least three articles or one book. (*See* Procedures for Submission of Candidacy for Promotion and Tenure. Departmental APT Committee ("Departmental Guidelines") at 2429). The Departmental Guidelines provide that a book "in the area of the dissertation. . . must represent a substantial reworking" to satisfy the minimum requirements for tenure. (*Id.*). Moreover, a "groundbreaking translation" may count as the equivalent of one article. (*Id.* at 2430).

The plaintiff offered Mr. Smart's deposition testimony as evidence of her qualifications. Mr. Smart testified that the plaintiff submitted a "well written . . . enlightening. . . good, solid, scholarly book." (Smart Dep. at 145) (referring to the plaintiff's book of poetry, *La estructura como apoyo tematico e ideologico en la poesia de Blas de Otero).* Mr. Smart emphasized that the plaintiff published this

book in her "target" language and that few scholars in her field ever do so, but this showing of support falls short of the showing needed to make viable the plaintiff's claim. (*See id*). This court has held that the plaintiff needs to provide more than a "colorable" argument and more than the opinion of one outside evaluator to successfully oppose summary judgment in the face of her employer's determination that she was not qualified to be promoted and tenured. *See Nayar Howard University*, 881 F. Supp. 15 (D.D.C. 1995) (citing *Zahorick v. Cornell University*, 729 F.2d 85, 93, 94 (2d Cir. 1994) ("a prima facie case . . . is made out by showing that some significant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on the question.")). In this light, the court concludes that the plaintiff has not established a prima facie case of discrimination under Section 1981.

b. The Defendants' Legitimate Reasons

Even assuming *arguendo* that the plaintiff could establish a prima facie case, the defendants have articulated legitimate grounds for denying the plaintiff tenure. Specifically, the defendants point out that the plaintiff met only the minimum publication requirements and based her Spanish-language publication almost exclusively upon her English-language thesis. (*See* Deposition of Mary Harris at 87). In that regard, defendants remind the court that an applicant who meets the minimum qualifications for tenure is not thereby guaranteed promotion. (*See* Guidelines at 3). Moreover, a search of the record reveals no evidence that the university awarded promotions and tenure to other applicants

with qualifications comparable to the plaintiff's during the relevant time frame.

c. Plaintiff's Burden of Proving a Pretext

The plaintiff does not state that the defendants' reasons are a pretext for discrimination. On the contrary, the plaintiff's own deposition buttresses the university's legitimate, non discriminatory reasons for denying her promotion and tenure. The plaintiff admits that her Spanish-language book merely changed the title of her dissertation and eliminated two chapters. (*See* Deposition of Mary Harris at 87). The plaintiff does not rebut the defendants' legitimate reasons by offering proof of a pretext. Accordingly, the plaintiff has not shown that the defendants engaged in intentional discrimination.

Accordingly, the court will grant the defendants' motion for summary judgment on the plaintiff's claims of race-based discrimination under Section 1981.

3. The Nonfederal Claims

When the federal-law component of a case drops out, a district court may dismiss the complaint without prejudice and remand the case to state court. *See* 28 U.S.C. §§ 1367 (c), (d) and 1441; *Murphy v. Kodz*, 351 F.2d 163 (9th Cir. 1965); *Masdea v. Scholz*, 742 F. Supp. 713 (D. Mass. 1990). In this case, the Section 1981 claim was the sole basis for the original removal, there are no other bases for federal jurisdiction and the remaining claims are founded solely on District of Columbia statutory and common law. This court

declines to determine whether summary judgment is warranted for the remaining claims. *See Edmondson and Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1263 (D.C. Cir. 1995) (district court abused its discretion by reaching the merits of local-law claims after it dismissed the federal claims). Rather, the court will remand the case to Superior Court for further proceedings.

IV. CONCLUSION

For the foregoing reasons, the court grants the defendants' motion for summary judgment on the Section 1981 claim. Moreover, the court remands the plaintiff's remaining claims to the District of Columbia Superior Court for further proceedings.

An Order directing the parties in a fashion consistent with this Memorandum Opinion is separately and contemporaneously executed this 29 day of November, 1999.

Hon. Ricardo M. Urbina
United States District Judge

Footnotes

[1] Local Rule 7.1(h) states, in relevant part,

> Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on

> to support the statement. An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement.... In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

LCvR 7.1(h).

[2] Several commentators have addressed this issue as well. *See, e.g.*. Leonard M. Baynes, *If It's Not Just Black and White Anymore Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131 (1997).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Mary A. Harris, Plaintiff v. Joyce A. Ladner, et al., Defendants

No. 95-1111

9/13/99, Filed

ORDER

DENYING PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME

UPON CONSIDERATION of the plaintiff's Motion for Enlargement of Time Within Which to File Opposition to Defendant's Motion for Summary Judgment and the defendant's Opposition to Motion for Enlargement,

it is this 13th day of September, 1999, hereby ORDERED that the plaintiff's motion for enlargement of time is DENIED.
SO ORDERED.

Ricardo M. Urbina
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mary A. Harris, Plaintiff v. Joyce A. Ladner, et al., Defendants

No. 95-1111

10/19/99, Filed

ORDER

Striking and Returning Portions of the Plaintiff's Voluminous Submissions That Do Not Constitute Opposing Affidavits

By order dated October 5, 1999, this court gave the plaintiff leave to file Opposing Affidavits to the Defendants' Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 6(d). Affidavits are voluntarily-made written statements of fact that are confirmed by an officer authorized to take the oath or affirmation of the party making the affidavit. *In re Central Stamping & Mfg Co.*, 77 F. Supp. 331, 332 (ED. Mich. 1948). Beginning on October 12, 1999 and continuing through October 14, 1999, the plaintiff filed voluminous submissions that do not constitute Opposing Affidavits. These submissions took the form of: a "Supplement to Plaintiff's Opposition to Defendants' Motion for Summary Judgment" and "Exhibits A-AV"; a "Statement of Material Facts as to Which There Exists Genuine Issues to be Litigated"; a "Table of Contents"; and a "Table of Exhibits."

Upon thorough review of the plaintiff's voluminous submissions filed subsequent to the court's Order dated October 5, 1999, and upon consideration of the plaintiff's timely filed Opposition to Defendants' Motion for Summary Judgment, defendants' timely filed submissions, this court's firm directives embodied in paragraph 2 of the Initial Scheduling and Procedures Order dated December 9, 1998 and Federal Rules of Civil Procedure 6(d) and 56(e),[1] it is this 19th day of October, 1999, hereby

ORDERED that the "Affidavit of Mary A. Harris," an Opposing Affidavit included as Exhibit S of the plaintiff's voluminous submissions, filed subsequent to the court's Order dated October 5, 1999 shall be FILED by the Clerk of the Court; and it is

FURTHER ORDERED that the plaintiff's Opposing Affidavit shall be SUPPLEMENTED by the "Deposition of Joyce Ladner" and the "Deposition of Ian Isidore Smart," included as Exhibits G and M of the plaintiff's voluminous submissions and referenced in the plaintiff's "Opposition to Defendants' Motion for Summary Judgment"; and it is

ORDERED that the remainder of the plaintiff's voluminous submissions filed subsequent to the court's Order dated October 5, 1999 shall NOT BE FILED and shall he STRICKEN AND RETURNED by the Clerk of the Court; and it is

FURTHER ORDERED that the plaintiff's submission dated September 15, 1999 and entitled "Plaintiff's Reply to

Defendants' Opposition to Plaintiff's Motion for Enlargement of Time within which to File Opposition to Defendants' Motion for Summary Judgment" shall NOT BE FILED and shall be STRICKEN AND RETURNED by the Clerk of the Court; and it is

ORDERED that further submissions shall not be filed by any party without leave of this court.

SO ORDERED.

[1]Federal Rule of Civil Procedure 56(e) provides that the court may "permit [supporting or opposing] affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits."

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mary A. Harris, Appellant v. Joyce A. Ladner, et al., Appellees

No. 99-7274 Consolidated with 00-7018

6/27/00, Filed

BEFORE: Williams, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed June 2, 2000, and of the letter from appellant filed June 14, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

BY: Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mary A. Harris, Appellant v. Joyce A. Ladner, et al., Appellees

No. 99-7274 Consolidated with 00-7018

6/27/00, Filed

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland,
Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, the letter from appellant filed on June 14, 2000, and the absence of a request for a vote by any member of the court it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT: Mark J. Langer,
Clerk
BY: Robert A. Bonner
Deputy Clerk

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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42 USCS §1981

UNITED STATES CODE SERVICE
*** CURRENT THROUGH P.L. 106-308, APPROVED 10/13/00 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 21. CIVIL RIGHTS
SUBCHAPTER I - GENERALLY

42 USCS § 1981 (2000)

§ 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by

nongovernmental discrimination and impairment under color of State law.

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28 USC 455

United States Code
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 21 - GENERAL PROVISIONS APPLICABLE TO COURTS AND JUDGES

Section 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

FEDERAL RULE OF CIVIL PROCEDURE 56

Rule 56. Summary Judgment

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but

the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.